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No. 10-882

FILED

In the
Supreme Court of the United States

IN RE ADOPTION OF G.V.

JASON AND CHRISTY VAUGHN,
Petitioners,

v.

BENJAMIN J. WYREMBEK,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Benjamin J. Wyrembek ("Respondent") respectfully requests that this Court deny the petition for a writ of certiorari ("Petition") filed by Petitioners Jason and Christy Vaughn ("Petitioners"). Petitioners seek review of the decision of the Ohio Supreme Court in *In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349, 933 N.E.2d 245, reconsideration denied 127 Ohio St.3d 1247, 2010 Ohio 4879 (hereinafter "*In re G.V.*"). In *In re G.V.*, the Ohio Supreme Court affirmed the appellate court's dismissal of Petitioners' adoption petition based on *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647. In affirming the appellate decision, the Ohio Supreme Court did not address any federal questions or constitutional claims as none were presented to it. Rather, the Ohio Supreme Court disposed of Petitioners' adoption petition under state law.

This case involves family and adoption law. These areas are traditionally the responsibility of the state. The facts in this case do not warrant intervention by this Court.

COUNTERSTATEMENT OF THE CASE

Petitioners statement of the case contains many allegations that are not supported by the record below. Most of Petitioners' statement contains allegations that are untrue and never litigated in the court below. The facts that are in the record support the following.

Grayson Bocvarov was born October 29, 2007, in Lucas County, Ohio. Within days after the child's birth, the mother (Drucilla Bocvarov) and her ex-

husband (Jovan Bocvarov) attempted to surrender the child into the permanent custody of a private child placing agency ("private agency"), pursuant to Ohio Rev. Code Ann. § 5103.15(A)(2). In both surrenders, Grayson was identified not as "Grayson Thomas Bocvarov," but as "Grayson Thomas Vaughn." (Pet. Appx. D & E). In his surrender of the child, the ex-husband stated: "I am not the biological father." (Pet. Appx. F).

The private agency immediately placed the child out-of-state with Indiana residents, Petitioners Vaughn. In the form from the Interstate Compact on the Placement of Children ("ICPC"), Grayson Thomas Bocvarov was again identified as "Grayson Thomas Vaughn." (Pet. Appx. F). The form was otherwise not complete and did not comply with Ohio law.

Within 17 days after the child's birth, Respondent registered with the Ohio Putative Father Registry, well within the 30-day time limit allowed by Ohio law. Within two months of the child's birth, on December 28, 2007, Respondent filed in the juvenile court of Fulton County, Ohio, a parentage and custody complaint relative to Grayson. Respondent served the complaint on both Petitioners and the private agency as party defendants. Shortly thereafter, the case was transferred to the juvenile court in Lucas County, Ohio, through the efforts of Petitioners.

On January 16, 2008, Petitioners filed a petition for adoption in the probate court of Lucas County, Ohio. The probate court ordered that Respondent be served with notice of the adoption petition. Respondent was served and filed an objection to the adoption on April 23, 2008. On May 19, 2008, the probate court stayed

the adoption proceedings pending determination of the parentage action in juvenile court.

Petitioners then proceeded to delay the parentage action and frustrate Respondent's efforts to establish a relationship with Grayson. Petitioners filed a motion to dismiss in the juvenile court, objecting to jurisdiction and asserting that the Lucas County, Ohio probate court had exclusive jurisdiction over the child. On June 20, 2008, the juvenile court ordered genetic testing. On July 24, 2008, the juvenile court ruled that it had jurisdiction to determine the parentage complaint, and denied party status to Petitioners. Petitioners appealed the June 20th order. The Ohio appellate court granted a temporary stay of the genetic testing and then ruled on September 2, 2008, that an order for genetic testing was not a final appealable order.

On September 10, 2008, Petitioners filed in the Ohio appellate court an original action in prohibition seeking an order prohibiting the judge of the juvenile court from proceeding with the parentage action. The appellate court again stayed the genetic testing. On January 16, 2009, the appellate court found that Petitioners did not show that the judge was without legal authority to preside over the paternity action. The appellate court vacated the stay on the order for genetic tests. *See State ex rel. Jason [V.] v. Cubbon*, 180 Ohio App.3d 595, 2009-Ohio-267, 906 N.E.2d 502.

Petitioners then tried unilaterally to limit the order. Petitioners asserted that the genetic tests could not be used to determine Respondent's status as a parent, but could only be used to obtain the natural father's social and medical history pursuant to Ohio

Rev. Code Ann. §§ 3107.09 and 3107.091. The genetic testing was performed in February 2009. On March 17, 2009, the juvenile court issued a judgment entry declaring Respondent to be Grayson's father. No limitations were placed on this order and Respondent was found to be the biological parent for all legal purposes. In this order, the juvenile court dismissed all pending motions and relieved the Guardian ad Litem of her duties. The juvenile court did *not* dismiss the parentage and custody action.

On June 4, 2009, the Lucas County probate court recognized that Respondent was Grayson's parent and dismissed the petition for adoption. (Pet. Appx. H).

On November 30, 2009, The Ohio Sixth District, Court of Appeals, affirmed the dismissal of Petitioners' petition for adoption. *In re G.V.*, 2009-Ohio-6338. (Pet. Appx. B). Ultimately, the Ohio Supreme Court upheld this decision in *In re G.V.*, 126 Ohio St.3d 249, and also denied Petitioners' request for reconsideration. (Pet. Appx. A & C).

The following facts were not part of the Ohio appellate and supreme court record. Respondent believes these facts, which are of public record, have relevance to this matter. The Ohio Supreme Court did not address any federal constitutional issues. However, Petitioners did seek relief in the federal courts. On January 14, 2010, Petitioners filed in federal court a due process and civil rights complaint against the Lucas County Probate Judge and Respondent. The federal court dismissed Petitioners' action for lack of subject-matter jurisdiction. *Bocarov (sic, Bocvarov)[Vaughn] v. Judge Puffenberger [Wyrembek]*, 2010 U.S. Dist. LEXIS 114176 (Ohio S.D.

Oct. 27, 2010). This order was never appealed by Petitioners. This federal court case involved many of the issues raised in the Petition filed with this Court.

Petitioners continued with a multitude of other frivolous litigation involving this child. The public record shows Petitioners have sought relief in every forum prior to their misguided attempt to seek relief in this Court. On November 5, 2010, Petitioners filed against Respondent a petition for writ of habeas corpus in the Ohio Tenth Appellate District. *In re G.T.B.*, 10th Dist. No. 10-AP-001057. Petitioners requested a writ ordering Respondent to immediately transfer to Petitioners the physical custody of Grayson. Respondent filed a motion to dismiss. The Ohio appellate court on December 1, 2010, dismissed Petitioners' action based on the lack of jurisdiction to review the decisions of Lucas County Juvenile Court. Petitioners appealed that decision to the Supreme Court of Ohio. *In re G.T.B. [Vaughn v Wyrembek]*, Ohio S.C. Case No. 2010-2266. Respondent moved the Ohio Supreme Court to dismiss the appeal. As of February 1, 2011, the appeal was still pending.

Petitioners also filed second, third and fourth petitions to adopt Grayson. The second petition was filed in the Indiana court in December 2009. The Indiana court consolidated Petitioners' custody and adoption proceedings. The Indiana court ultimately held that Indiana did not have jurisdiction over Grayson, vacated the temporary custody order and ordered Petitioners to turn over possession of Grayson to the private agency. Petitioners' third adoption petition was filed in April 2010 in the probate court of Lucas County, Ohio, and was based on Ohio Rev. Code Ann. § 3107.07(A). Respondent filed objections and a

motion to dismiss the petition. Petitioners withdrew their Lucas County adoption petition in August 2010. On September 13, 2010, Petitioners filed a fourth adoption petition in the probate court of Franklin County, Ohio. This petition was also based on Ohio Rev. Code Ann. § 3107.07(A). Respondent filed objections and a motion to dismiss. The Franklin County petition for adoption was dismissed by a magistrate. Petitioners filed objections to that dismissal. The Franklin County probate court has not yet held a hearing on Petitioners' objections to the magistrate's decision.

Petitioners also filed in the Supreme Court of Ohio four original actions in prohibition seeking an order prohibiting the Lucas County juvenile court judge from proceeding with Respondent's custody request. In the first prohibition action, on August 4, 2009, the Ohio Supreme Court considered the juvenile judge's answer and motion for judgment on the pleadings, granted that motion and dismissed prohibition action. *State ex rel. Vaughn v. Judge Cubbon*, 122 Ohio St.3d 1487, 2009-Ohio-3830, 910 N.E.2d 1040. Petitioners then filed three additional writs of prohibition against the juvenile judge and each of these cases were dismissed. *See State ex rel. Vaughn v. Cubbon*, 122 Ohio St.3d 1528, 2009-Ohio-4944, 913 N.E.2d 983; *State ex rel. Vaughn v. Cubbon*, 124 Ohio St.3d 1471, 2010-Ohio-354, 921 N.E.2d 243; *State ex rel. Vaughn v. Cubbon*, 126 Ohio St.3d 1557, 2010-Ohio-4169, 933 N.E.2d 266.

REASONS FOR DENYING THE PETITION

This Court does not have jurisdiction to review this case. Petitioners did not present to the Ohio Sixth District, Court of Appeals, or to the Ohio Supreme

Court any of the federal questions asserted in their Petition. These courts merely interpreted Ohio statutes that relate to the adoption process in Ohio. Petitioners do not raise any important, unsettled federal question that should be resolved by this Court. Petitioners do not implicate any important federal question that has been decided in a way that conflicts with relevant decisions of this Court. As a result, Petitioners have not shown any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The State Courts Were Not Presented with and Did Not Rule on a Federal Question.

The scope of the Court's jurisdiction to review state court decisions is defined by 28 U.S.C. § 1257(a). It is well settled that the Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), quoting *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). If federal claims were not pressed or passed upon in state court, this Court will not decide the federal claims. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988).

In the first and second questions for review, Petitioners suggest that persons with whom a child has been placed for purposes of adoption, as well as the proposed adoptee, have a fundamental liberty interest in their placement family and have a due process right to notice and hearing before the child is removed from their placement home. Petitioners ignore that the removal of the child by the private agency and the placement with Petitioners were not legal under Ohio

law. It is tantamount to arguing that a kidnapper of a child obtains rights relative to that child.

Petitioners did not present their first and second questions to the state courts. In their petition for adoption of Grayson, Petitioners did claim a federal due process right of the birth-mother. (Pet. Appx. G, at p. 43a). Petitioners stated that Ohio Rev. Code Ann. §3107.06(C) "is unconstitutional in its application to this placement and petition [for adoption], where the right of the birth-mother to place this infant at birth for adoption is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution[.]" Petitioners, however, did not present in their adoption petition any federal title, right or privilege held by Petitioners or by Grayson. Petitioners did not raise any federal title, right or privilege in their briefs filed in the state appellate and supreme courts. (Pet. Appx. I & K). The decisions of the probate court, the appellate court and the state supreme court did not rule on any federal claim of Petitioners or Grayson. (Pet. Appx. H, B & A).

The liberty interest and due process rights now claimed by Petitioners were not pressed or passed upon in the state courts below. The Court must decline Petitioners' first and second questions presented for review.

II. There Are No Important, Unsettled Federal Questions That Should Be Settled by This Court.

Petitioners suggest that there are substantial, unsettled questions concerning whether prospective adoptive parents and the proposed adoptee should be

afforded constitutional protections. Even though these issues were not presented below or properly preserved for appeal, Respondent submits that these issues are without merit.

A. Prospective Adoptive Parents Do Not Have the Same Fundamental Liberty Interest as Natural Parents.

Petitioners propose that prospective adoptive parents have a constitutional right to the care, custody and control of the child placed with them for adoption. To support this proposition, Petitioners refer to *Smith v. Organization of Foster Families for Equality and Reform (OFFER),* 431 U.S. 816 (1977), and the unresolved issue of a protected liberty interest for the foster family. In *OFFER*, the Court cautioned that any liberty interest of the foster family would be weakened by the natural parents' interest. In *OFFER*, the Court stated:

"It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right – an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal

from the foster family is to return the child to his natural parents." *Id.* at 846-847.

Similarly, any liberty interest for a placement or adoptive family must be substantially dependent upon the legality of the placement and upon the interests of the natural parents. In the present case, Petitioners' proposed protected interest rests upon the false assumption that Grayson was legally placed with Petitioners. The state courts below did not rule on this issue. The law and facts show that Grayson's placement was not legal. Grayson's placement was improperly obtained through a permanent surrenders which had no legal effect and through improper filings within the ICPC.

1. Permanent Surrenders, Ohio Rev. Code Ann. § 5103.15(B)(2)

Ohio Rev. Code Ann. § 5103.15(B)(2) allows the "parents" of a child to enter into an agreement with a private child placing agency and surrender the child into the permanent custody of the agency. Ohio Rev. Code Ann. § 2151.011(B)(30) and Rule 2(Z) of the Ohio Rules of Juvenile Procedure both state that:

> "'Permanent custody' means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the ***natural parents*** or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations." (Emphasis added.)

The adoption agency obtained the permanent surrenders of the natural mother and the legally presumed father. The Ohio Supreme Court in *Adoption Link, Inc. v. Suver*, 112 Ohio St.3d 166, 2006 Ohio 6528, 858 N.E.2d 424 (2006), held that a permanent surrender signed by a parent who did not have custody of that child was invalid and of no force and effect. Here, the record is clear that Jovan Bocvarov's surrender was not valid as he did not have custody of this child. Any legal presumption in this case was further nullified by Jovan Bocvarov stating in his surrender that: "I am not the biological father." (Pet. Appx. E). In contrast, Ohio law did allow Respondent, as a registrant with the putative father registry, rights in a voluntary surrender under Ohio Rev. Code Ann. § 5103.15(B)(2). See Ohio Administrative Code § 5101:2-48-02(I), eff. 9-1-03 to 5-15-09. The private adoption agency did not obtain the permanent surrender of Respondent, the natural father.

2. ICPC, Ohio Rev. Code Ann. § 5103.23

The ICPC requires compliance with the laws of the sending state. See *In re Adoption of Lichtenberg*, 12th Dist. No. CA2002-11-125, 2003-Ohio-1014, at ¶13. Ohio's requirements for an ICPC placement are stated in Ohio Administrative Code § 5101:2-52-06. This rule provides in pertinent part as follows:

> "I If an Ohio PCPA [private child placing agency], PNA or court is planning the placement of a child into another state or territory, the PCPA, PNA or court shall send the following to the Ohio ICPC office for each placement resource being requested:

"***

"(i) Documentation indicating the child is legally free for adoption by submitting the JFS 01666 "Permanent Surrender of a Child" (rev. 6/2006) or a document demonstrating that parental rights have been terminated; and the agency's authority to place the child for adoption.

"(ii) The JFS 01695 "Application for Search of Ohio's Putative Father Registry" (rev. 3/2008). ***"

Based on these requirements, the private agency in the present case was required to obtain the consent of both *birth* parents. The private agency obtained the permanent surrender of the birth mother. However, it did not obtain the permanent surrender of the birth father. As a birth father who timely registered, Respondent had rights in a permanent surrender (JFS 01666) under the ICPC pursuant to the laws of Ohio, i.e., Ohio Rev. Code Ann. § 5103.15(B)(2), and Ohio Administrative Code § 5101:2-48-02(I), eff. 9-1-03. The child's placement with Petitioners pursuant to the ICPC required Respondent's consent, as a matter of law. The private agency was also required to fully complete the forms required under the ICPC. The forms did not list any parents and did not list the birth name of the child. Grayson's placement was not valid and enforceable under the ICPC.

3. No Reasonable Expectation in Permanency

Petitioners contend that, unlike the foster parents in OFFER, they had an expectation that their family

unit was permanent. Petitioners' assertion is not based in fact. Respondent timely registered with the putative father registry. Respondent served Petitioners with his paternity and custody complaint when Grayson was less than three months old. Respondent filed objections to the adoption. Respondent obtained visitation rights with Grayson and attempted to implement those rights. Reasonable persons should have known that Respondent wanted the care, custody and control of his son. Reasonable persons would not expect to adopt the child of another who, like Respondent, demonstrated interest, diligence and persistence to obtain a relationship with the child. Petitioners therefore did not have an expectation of a permanent relationship with Grayson.

4. No "Clean Hands"

Respondent's parentage action was repeatedly delayed by Petitioners. The opportunity to resolve the parentage issues within two months of birth, while the child was still an infant, was destroyed by Petitioners' delays. Petitioners had nothing to lose by delaying the parentage and custody proceedings in juvenile court. In fact, as a result of their delays, Petitioners manufactured the argument that the child had bonded with them and their family and that removal from their home was not in the child's best interests. Petitioners have created the current proposal for constitutional rights for prospective adoptive parents and the proposed adoptee by their delaying tactics. Petitioners never had a legal right to have this child, let alone any constitutional rights.

For these reasons, there is no substantial, unsettled question respecting a constitutionally protected liberty

interest or due process rights for prospective adoptive parents or for Petitioners.

B. The Proposed Adoptee Does Not Have a Fundamental Liberty Interest in the Prospective Adoptive Family Unit.

Petitioners contend that a child placed with prospective adoptive parents has a liberty interest in the adoptive family unit and a due process right in notice and a hearing prior to removal from the placement home. Again, this issue was never raised in the lower courts. Petitioners conveniently limit their proposal for the child's constitutional rights to purposes of adoption. Petitioners either deliberately ignore or are oblivious to a potential liberty interest more basic than an interest in an adoptive family. Grayson arguably had a basic human right, symmetrical with that of his natural parent, to establish a parent-child relationship with Respondent. Respondent took steps to safeguard his parental rights shortly after Grayson's birth. He timely registered with the putative father registry. He filed a parentage and custody action. As such, Grayson's potential liberty interest to be in the care, custody and control of Respondent arose shortly after his birth. Petitioners denied Grayson his constitutional rights.

For these reasons, there is no substantial, unsettled issue concerning fundamental or due process rights of a child to a prospective adoptive family.

III. There Are No Important Federal Questions That Have Been Decided in a Way That Conflicts with Relevant Decisions of This Court.

Petitioners claim that the state courts below misapplied the definition of "putative father" in Ohio Rev. Code Ann. § 3107.01(H)(3) and improperly classified Respondent as a father in violation of this Court's precedent. Petitioners again seek to gain an audience with this Court even though the Ohio Supreme Court decision was based solely on an interpretation of Ohio law.

This Court has held that an unwed father who has taken steps to establish a custodial or supportive relationship with the child has a constitutionally protected interest in that relationship. *Caban v. Mohammed*, 441 U.S. 380 (1979), *Stanley v. Illinois*, 405 U.S. 645 (1972). The Due Process Clause and Equal Protection Clauses of the United States Constitution bar the state from terminating the parental rights of the unwed father without the same showing of unfitness required to terminate the rights of a mother or a married father. *Caban*, 441 U.S. at 393-394; *Stanley*, 405 U.S. at 658. However, if the unwed father does not take steps to establish a relationship, then the state may terminate his parental rights through procedures less strict than those necessary to terminate the parental rights of a mother or married father. *Lehr v. Robertson*, 463 U.S. 248, 267-268 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 255-256 (1978). The Ohio courts below effectively recognized and upheld these long held precedents.

Adoption without parental consent results in the termination of parental rights. *In re Adoption of Masa*, 23 Ohio St.3d 163, 165 (1986); *In re Schoeppner*, 46 Ohio St.2d 21, 24 (1976). Under Ohio adoption law, the consents to adopt of legal fathers and putative fathers can be excused under two different standards. Ohio Rev. Code Ann. § 3107.07(A) applies to a legal father and the question is whether he failed without justifiable cause to communicate with the minor or provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition. Ohio Rev. Code Ann. § 3107.07(B) applies to a putative father and the question is whether he abandoned the birth mother during her pregnancy and up to her time of surrender of the child.

Under Ohio Rev. Code Ann. § 3107.01(H), a man is a "putative father" if "[h]e has not been determined, prior to the date a petition for adoption is filed, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code," i.e., a paternity action. *See* Ohio Rev. Code Ann. § 3107.01(H)(3).

In re Adoption of Pushcar, 110 Ohio St.3d 332, the Ohio Supreme Court, in its syllabus, held:

> "When an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child."

The *Pushcar* decision recognized that an unwed father activated and preserved his constitutional liberty interest in a parental relationship by his registration

with the putative father registry ***and*** by his commencement of a parentage action prior to the filing of an adoption petition. The *Pushcar decision* effectively corrected a constitutional flaw in Ohio Rev. Code Ann. § 3107.01(H)(3). The act of the unwed father in filing a paternity action, and not the subsequent judicial determination of fatherhood by genetic tests, entitled the unwed father to be elevated to legal father status.

The act of filing a paternity action is a demonstrative step to establishing a custodial *and* supportive relationship with the child. A parentage action shows a commitment to the child and to the responsibilities of parenthood. By filing such an action, the unwed father voluntarily submits himself to court orders concerning the child. By filing such an action and serving process on pertinent parties, the unwed father states to the birth-mother, the prospective adoptive parents, the adoption agency and to the courts that he is present and ready to be tested for parentage and examined for fitness to the care of his child. Further, the filing a paternity action should be given greater significance where the child at issue was a newborn.

Respondent Wyrembek timely registered with the Ohio Putative Father Registry and filed a complaint to establish paternity prior to the filing of the petition for adoption. Respondent did everything legally possible to establish he was the child's father. He should not be treated differently than a man who acknowledged parentage in a situation where the birth mother was cooperative in finalizing a child's parentage. Such a different treatment would violate the equal protection guarantees of the United States Constitutions. Under

Petitioners' interpretation of Ohio Rev. Code Ann. § 3107.01(H), the birth mother and/or the prospective adoptive parents could control whether an unwed father was a legal father or a "putative father" as defined in Ohio Rev. Code Ann. § 3107.01(H). The birth mother could control the consent requirements of an unwed father by either cooperating with the parentage determination or by delaying that determination as long as possible in an attempt to cut off the man's right to object to the adoption. The prospective adoptive parents would be able to impose the "putative father" definition upon the biological father merely by filing their adoption petition in probate court before they produced the child in juvenile court for genetic testing. Also, under Petitioners' version of the statute, an unwed father could be denied legal father status merely by the juvenile court's inability to complete genetic testing prior to the filing of an adoption petition. Under Petitioners' position, Respondent's affirmative steps to protect his right to object to the adoption would go unrecognized under Ohio adoption law.

The decision of the Supreme Court of Ohio in *In re G.V.* does not conflict with the decisions of this Court regarding unwed fathers.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully request that the Court deny the Petition. The Petition filed herein is completely without merit and is a frivolous attempt to seek review of a decision of the Ohio Supreme Court that did not involve any federal constitutional issues.

Respectfully submitted,

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